

## Message Text

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ORIGIN OPIC-06

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DRAFTED BY OPIC/D:RPOAST:PLD

APPROVED BY EB/IFD/OIA:RJSMITH

OPIC/GC:CHUNT(DRAFT)

OPIC/ID:GMORGAN(DRAFT)

OPIC/ID:CMIDDLETON(DRAFT)

EB/IFD/OIA:DHSTEBBING

NEA/ARP:FDICKMAN

L/E:PTRIMBLE

L/T:MMCQUADE

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R 191551Z OCT 74

FM SECSTATE WASHDC

TO AMEMBASSY JIDDA

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E.O.11652:NA

TAGS: EGEN EINV SA

SUBJ: AGREEMENT TO INSTITUTE OPIC PROGRAM

1. WORKING GROUP ON INDUSTRIALIZATION DISCUSSED ON SEPTEMBER 27  
POTENTIAL ROLES OF U.S. PRIVATE CONTRACTORS AND INVESTORS IN  
INTRODUCTION OF U.S. INDUSTRIAL TECHNOLOGY TO SAUDI ARABIE.  
USG DELEGATIONS STATED THAT SAUDI ARABIA'S ACCESS TO PRIVATELY  
HELD TECHNOLOGY WOULD BE INCREASED, AND TERMS AND MANNER OF U.S.  
COMPANIES' PROVISION OF TECHNOLOGY WOULD BE MORE FAVORABLE TO  
SAUDI DEVELOPMENT INTERESTS, IF INSURANCE AGAINST POLITICAL RISKS  
WERE AVAILABLE. SAG DELEGATION ASSERTED THAT SAG POLICY STATE-  
MENTS AND FOREIGN INVESTMENT CODE SHOULD BE ADEQUATE ASSURANCE OF  
WELCOME AND FAIR TREATMENT AND DESCRIBED DISPUTE-SETTLEMENT  
FACILITIES AVAILABLE TO FOREIGN INVESTORS AND CONTRACTORS.  
HOWEVER, SAG DELEGATION ACCEPTED USG VIEW THAT SOME U.S. COMPANIES  
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WILL NOT MAKE LONG-TERM COMMITMENTS IN AN UNFAMILIAR LEGAL AND  
CULTURAL ENVIRONMENT WITHOUT INSURANCE AGAINST WAR/INSURRECTION,  
EXPROPRIATION AND/OR DEFAULT BY HOST GOVERNMENT.

2. OPIC REPRESENTATIVE FURNISHED SAG DELEGATION STANDARD OPIC BILATERAL INVESTMENT GUARANTY AGREEMENT TEXTS IN ENGLISH AND ARABIC AND EXPLAINED PURPOSE OF VALUE OF SUCH A COMPREHENSIVE AGREEMENT ESTABLISHING PROCEDURES FOR RESOLUTION OF DISPUTES BETWEEN SAG AND OPIC IN EVENT OPIC SUCCEEDS TO INTERESTS OR CLAIMS OF A U.S. INVESTOR OR CONTRACTOR. SAG DELEGATION HAD ALREADY STUDIED OPIC BILATERAL AND SAID PROBLEMS RAISED BY IT WERE UNDERGOING FURTHER STUDY BY SAG. THEY NOTED THAT INSURANCE IS NOT RECOGNIZED UNDER SAUDI LAW, AND THEREFORE AGREEMENT (PRESUMABLY ITS SUBROGATION/ARBITRATION PROVISIONS) RAISED PROBLEMS FOR SAG. OPIC REP SAID A VERY LIMITED OPIC PROGRAM MIGHT BE INITIATED ON THE BASIS OF AN EXCHANGE OF BRIEF DIPLOMATIC NOTES. OPIC WOULD THEN MAKE CASE BY CASE DETERMINATIONS AS TO WHETHER OPIC'S POTENTIAL FINANCIAL INTEREST IN A PARTICULAR RIGHT PROPOSED FOR INSURANCE WOULD BE ADEQUATELY PROTECTED BY TERMS OF CONTRACT AND SAUDI LAW. IF SAG ADHERED TO ICSID CONVENTION (AS MEMBER OF SAG DELEGATION SAID WAS BEING ACTIVELY CONSIDERED), OPIC COULD CONSIDER INSURING A BROADER RANGE OF INVESTMENTS COVERED BY A SUITABLE ICSID ARBITRATION CLAUSE WITHOUT OBTAINING SAG'S AGREEMENT TO USG-SAG ARBITRATION OF DISPUTES.

3. SAG DELEGATION AND OTHER USG REPS SUGGESTED IMMEDIATE EXCHANGE OF BRIEF NOTES INSTITUTING OPIC PROGRAM. OPIC REPRESENTATIVE AGREED TO INITIATE PREPARATION OF SUCH INTERIM PROPOSAL FOR FORWARDING TO EMBASSY JIDDA, WITH UNDERSTANDING THAT SAG WOULD PROCEED IN MEANTIME TO CONSIDER STANDARD INVESTMENT GUARANTY BILATERAL AGREEMENT WITH VIEW TO EARLY DECISION ON WHETHER SOME OR ALL OF ITS PROVISIONS MIGHT BE INCORPORATED IN A SUPPLEMENTAL NOT EXCHANGE. HOWEVER, IN SUBSEQUENT DISCUSSIONS BETWEEN OPIC AND THE DEPARTMENT, IT WAS RECOGNIZED THAT SUCH AN INTERIM AGREEMENT MIGHT NEVER BE IMPROVED. IT WOULD RESTRICT FORMS OF INVESTMENT OPIC COULD INSURE. IT IS PREFERABLE, THEREFORE, TO PROPOSE A SOMEWHAT SHORTENED AGREEMENT, COUCHED IN TERMS COMPATIBLE WITH SAUDI PRACTICE AND SENSITIVITIES, BUT CONTAINING THE STANDARD INTERNATIONAL ARBITRATION PROVISION AND A VARIANT OF THE SUBROGATION CLAUSE. ARBITRATION CLAUSE WOULD NOT (REPEAT) NOT DISPLACE RECOURSE BY SAG OR U.S. INVESTOR/CONTRACTOR  
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TO LOCAL JUDICIAL PROCESS OR OTHER DISPUTES SETTLEMENT MECHANISM AGREED TO BETWEEN THEM.

4. FOLLOWING TEXT ACCORDINGLY IS CONFINED TO CHANGES TO DELETE INSURANCE TERMINOLOGY AND PROVISIONS FOR LOCAL CURRENCY RECEIVED UNDER INCONVERTIBILITY COVERAGE AND TO ADD LANGUAGE PROVIDING FOR THE POSSIBLE FUTURE OPERATION OF THE PROGRAM BY EITHER OPIC OR A JOINING PUBLIC-PRIVATE ENTITY. WHILE WE REALIZE THAT MANY PREVIOUS ATTEMPTS TO NEGOTIATE INVESTMENT GUARANTEES WITH THE SAUDIS HAVE FAILED, WE BELIEVE THE SAUDIS ARE BECOMING INCREASINGLY AWARE THAT LACK OF ANY GUARANTEES MAY HURT THEIR ACCESS TO U.S. TECHNOLOGY.

5. ACCORDINGLY EMBASSY IS AUTHORIZED AT ITS DISCRETION TO PROPOSE AND CONCLUDE AN AGREEMENT TO INSTITUTE A LIMITED OPIC PROGRAM THROUGH AN EXCHANGE OF NOTES WITH MINISTER OF FOREIGN AFFAIRS. FOLLOWING IS PROPOSED TEXT OF AMBASSADOR'S NOTE. QUOTE:

EXCELLENCY:

I HAVE THE HONOR TO REFER TO CONVERSATIONS WHICH HAVE RECENTLY TAKEN PLACE BETWEEN REPRESENTATIVES OF OUR TWO GOVERNMENTS RELATING TO THE ROLE OF UNITED STATES PRIVATE ENTERPRISE IN PROJECTS BRINING NEW TECHNOLOGY TO SAUDI ARABIA, AND TO THE FACILITATION OF SUCH ROLE THROUGH PROGRAMS OF THE OVERSEAS PRIVATE INVESTMENT CORPORATION OR COMPARABLE PROGRAMS WHICH MAY BE AUTHORIZED BY UNITED STATES LEGISLATION. I ALSO HAVE THE HONOR TO CONFIRM THE FOLLOWING UNDERSTANDINGS REACHED AS A RESULT OF THOSE CONVERSATIONS:

1. IN ORDER TO INCREASE PARTICIPATION BY UNITED STATES PRIVATE ENTERPRISE IN PROJECTS BRINGING NEW TECHNOLOGY TO SAUDI ARABIA, PERSONS ELIGIBLE UNDER APPLICABLE UNITED STATES LEGISLATION MAY BE ISSUED GUARANTIES AGAINST LOSS DUE TO SPECIFIED RISKS RELATING TO CONTRACTS OR INVESTMENTS IN SAUDI ARABIA WHICH ARE APPROVED BY THE GOVERNMENT OF SAUDI ARABIA (HEREINAFTER "GUARANTIES"). THE GOVERNMENT OF THE UNITED STATES OF AMERICA AGREES THAT A CONTRACT OR INVESTMENT SHALL BE DEEMED APPROVED FOR PURPOSES OF THIS AGREEMENT ONLY IF ENTERED INTO WITH THE GOVERNMENT OF SAUDI ARABIA, OR AN AGENCY THEREOF, OR OTHERWISE APPROVED IN ACCORDANCE WITH THE APPLICABLE LAWS AND REGULATIONS OF SAUDI ARABIA.

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2. THE GOVERNMENT OF SAUDI ARABIA AGREES THAT, WITH RESPECT TO GUARANTIES ISSUED IN ACCORDANCE WITH THIS AGREEMENT, AN ENTITY DESIGNATED BY THE GOVERNMENT OF THE UNITED STATES OF AMERICA WHICH HAS MADE PAYMENTS PURSUANT TO SUCH GUARANTIES OR HAS RECEIVED ASSIGNMENTS IN CONNECTION THEREWITH SHALL BE RECOGNIZED AS SUCCEEDING TO THE RIGHTS OF THE GUARANTEED PERSON OR FIRM.

3. (A) DIFFERENCES BETWEEN THE TWO GOVERNMENTS CONCERNING THE INTERPRETATION OF THE PROVISIONS OF THIS AGREEMENT SHALL BE RESOLVED, INsofar AS POSSIBLE, THROUGH NEGOTIATIONS BETWEEN THE TWO GOVERNMENTS. IF SUCH A DIFFERENCE CANNOT BE RESOLVED WITHIN A PERIOD OF THREE MONTHS FOLLOWING THE REQUEST FOR SUCH NEGOTIATIONS, IT SHALL BE SUBMITTED, AT THE REQUEST OF EITHER GOVERNMENT, TO AN ARBITRAL TRIBUNAL FOR RESOLUTION IN ACCORDANCE WITH PARAGRAPH 3(C).

(B) ANY CLAIM, ARISING OUT OF ANY CONTRACT OR INVESTMENT FOR WHICH A GUARANTY HAS BEEN ISSUED IN ACCORDANCE WITH THIS AGREEMENT, AGAINST EITHER OF THE TWO GOVERNMENTS, WHICH, IN

THE OPINION OF THE OTHER, PRESENTS A QUESTION OF PUBLIC INTERNATIONAL LAW SHALL, AT THE REQUEST OF THE GOVERNMENT PRESENTING THE CLAIM, BE SUBMITTED TO NEGOTIATIONS. IF AT THE END OF THREE MONTHS FOLLOWING THE REQUEST FOR NEGOTIATIONS THE TWO GOVERNMENTS HAVE NOT RESOLVED THE CLAIM BY MUTUAL AGREEMENT, THE CLAIM, INCLUDING THE QUESTIONS OF WHETHER IT PRESENTS A QUESTION OF PUBLIC INTERNATIONAL LAW, SHALL BE SUBMITTED, AT THE REQUEST OF EITHER GOVERNMENT, TO AN ARBITRAL TRIBUNAL FOR RESOLUTION IN ACCORDANCE WITH PARAGRAPH 3(C).

(C) THE ARBITRAL TRIBUNAL FOR RESOLUTION OF DISPUTES PURSUANT TO PARAGRAPHS 3(A) AND 3(B) SHALL BE ESTABLISHED AS FUNCTION AS FOLLOWS:

(I) EACH GOVERNMENT SHALL APPOINT ONE ARBITRATOR; THERE TWO ARBITRATORS SHALL DESIGNATE A PRESIDENT BY COMMON AGREEMENT WHO SHALL BE A CITIZEN OF A THIRD STATE AND BE APPOINTED BY THE TWO GOVERNMENTS. THE ARBITRATORS SHALL BE APPOINTED WITHIN TWO MONTHS AND THE PRESIDENT WITHIN THREE MONTHS OF THE DATE OF RECEIPT OF EITHER GOVERNMENT'S REQUEST FOR ARBITRATION. IF THE APPOINTMENTS ARE NOT MADE WITHIN THE FOREGOING TIME LIMITS, EITHER GOVERNMENT MAY, IN THE ABSENCE OF ANY OTHER AGREEMENT, REQUEST THE PRESIDENT OF THE INTERNATIONAL COURT OF JUSTICE TO MAKE THE NECESSARY APPOINTMENT OR APPOINTMENTS, AND BOTH GOVERNMENTS AGREE TO ACCEPT SUCH APPOINTMENT OR APPOINTMENTS.

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MONTHS OF THE DATE OF RECEIPT OF EITHER GOVERNMENT'S REQUEST FOR ARBITRATION. IF THE APPOINTMENTS ARE NOT MADE WITHIN THE FOREGOING TIME LIMITS, EITHER GOVERNMENT MAY, IN THE ABSENCE OF ANY OTHER AGREEMENT, REQUEST THE PRESIDENT OF THE INTERNATIONAL COURT OF JUSTICE TO MAKE THE NECESSARY APPOINTMENT OR APPOINTMENTS, AND BOTH GOVERNMENTS AGREE TO ACCEPT SUCH APPOINTMENT OR APPOINTMENTS.

(II) THE ARBITRAL TRIBUNAL SHALL BASE ITS DECISION ON THE APPLICABLE PRINCIPLES AND RULES OF PUBLIC INTERNATIONAL LAW. THE ARBITRAL TRIBUNAL SHALL DECIDE BY MAJORITY VOTE. ITS DECISION SHALL BE FINAL AND BINDING. ONLY THE TWO GOVERNMENTS MAY REQUEST THE ARBITRAL PROCEDURE AND PARTICIPATE IN IT.

(III) EACH OF THE GOVERNMENTS SHALL PAY THE EXPENSE OF ITS ARBITRATOR AND OF ITS REPRESENTATION IN THE PROCEEDING BEFORE THE ARBITRAL TRIBUNAL; THE EXPENSES OF THE PRESIDENT AND THE OTHER COSTS SHALL BE PAID IN EQUAL PARTS BY THE TWO GOVERNMENTS. THE ARBITRAL TRIBUNAL MAY ADOPT REGULATIONS CONCERNING THE COSTS, CONSISTENT WITH THE FOREGOING.

(IV) IN ALL OTHER MATTERS, THE ARBITRAL TRIBUNAL SHALL REGULATE ITS OWN PROCEDURES.

4. THIS AGREEMENT SHALL CONTINUE IN FORCE UNTIL SIX MONTHS FROM THE DATE OF RECEIPT OF A NOTE BY WHICH ONE GOVERNMENT

INFORMS THE OTHER OF AN INTENT NO LONGER TO BE A PARTY OF THE AGREEMENT. IN SUCH VENT, THE PROVISIONS OF THE AGREEMENT WITH RESPECT TO GUARANTIES ISSUED WHILE THE AGREEMENT WAS IN FORCE SHALL REMAIN IN FORCE FOR THE DURATION OF SUCH GUARANTIES, BUT IN NO CASE LONGER THAN TWENTY YEARS AFTER THE DENUNCIATION OF THE AGREEMENT.

UPON RECEIPT OF A NOTE FROM YOUR EXCELLENCY INDICATING THAT THE FOREGOING PROVISIONS ARE ACCEPTABLE TO THE GOVERNMENT OF SAUDI ARABIA, THE GOVERNMENT OF THE UNITED STATES OF AMERICA WILL CONSIDER THAT THIS NOTE AND YOUR REPLY THERETO CONSTITUTE AN AGREEMENT BETWEEN OUR TWO GOVERNMENTS ON THIS SUBJECT.

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ACCEPT, EXCELLENCY, THE RENEWED ASSURANCES OF MY HIGHEST CONSIDERATION. UNQUOTE.

6. OPIC VICE PRESIDENT FOR DEVELOPMENT RUTHERFORE POATS WOULD BE AVAILABLE TO VISIT JIDDA OR RIYADH TO PURSUE DISCUSSIONS WITH SAUDIS FOLLOWING OCTOBER 21-22 BERNE UNION MEETING IN ROME. WE REALIZE HE WOULD ARRIVE IMMEDIATELY AFTER RAMADAN HOLIDAYS. HE WOULD COME ONLY IF EMBASSY BELIEVES SUCH ASSISTANCE WOULD BE HELPFUL AND TIMELY. REQUEST EMBASSY PASS COPY ITS RESPONSE TO AMEMBASSY ROME FOR POATS.

DECON 12-31-75. KISSINGER

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